

South Carolina Law Review

Volume 68
Issue 2 *SYMPOSIUM: VETERAN ACCESS TO
JUSTICE*

Article 4

Winter 2016

The Need for Better Medical Evidence in VA Disability Compensation Cases and the Argument for More Medical-Legal Partnerships

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Simcox, Stacey-Rae (2016) "The Need for Better Medical Evidence in VA Disability Compensation Cases and the Argument for More Medical-Legal Partnerships," *South Carolina Law Review*: Vol. 68 : Iss. 2 , Article 4.

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**THE NEED FOR BETTER MEDICAL EVIDENCE IN VA DISABILITY
COMPENSATION CASES AND THE ARGUMENT FOR MORE MEDICAL-
LEGAL PARTNERSHIPS**

Stacey-Rae Simcox *

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* The author would like to thank the following people for helping and supporting our nation’s disabled veterans when they most need it: Shirley Wells, Trista Miller, Michael Allen, Chris Pietruszkiewicz, Dr. Isis Marrero, Dr. Michelle Mattingly, Dr. Sanders Chae, Dr. Peter Pavan, Dr. Charles Lockwood, Dr. Matthew Nessetti, Lindsey Sheppy, Allyson Holca, Kristen Colelli, and Hoyt Prindle, III.

I. INTRODUCTION

The Department of Veterans Affairs (VA) disability compensation process is intended to recompense military veterans who suffer a physical or mental disability caused by their service in the United States military.¹ Anyone who has worked to help a veteran navigate the VA disability compensation system knows that the process can be daunting. A veteran is required to provide evidence to the VA that the disability he suffers is related to his military service.² While the VA system does have procedures that are intended to ease the burden of providing this evidence, the overall implementation of the system, particularly when it applies to medical evidence, is not terribly efficient or effective.

Recognizing the importance of medical evidence in particular to establish a veteran's entitlement to disability compensation, this Article intends to 1) provide an overview of the veteran's need for medical evidence; 2) discuss some of the issues within the VA system that inhibit a veteran from reaping the statutory benefit Congress intended the VA system to provide; and 3) provide an alternate method of helping veterans to navigate the medical evidentiary requirements of this process. To explore these topics, a case study will be provided in order to examine the issues in more depth.

II. AN OVERVIEW

Congress, since the Revolutionary War, has intended to provide some measure of care and compensation to our nation's military veterans.³ While the amounts and types of that compensation have varied depending on the

1. 38 U.S.C. § 1110 (2012).

2. *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd*, 78 F.3d 604 (Fed. Cir. 1996).

3. *See generally*, WILLIAM H. GLASSON, *FEDERAL MILITARY PENSIONS IN THE UNITED STATES* (David Kinley ed., 1918) (offering a history of federal military pensions); James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 VETERANS L. REV. 135, 135–39, 154–57 (2011) (discussing the “tradition of veterans’ benefits”); Dennis Whelan, *William Henry Glasson and the First Hundred Years of Federal Compensation for Service Connected Disability in America* 45–46 (Aug. 31, 2013) (unpublished manuscript) (on file with author) (offering an overview of pension laws passed after the civil war).

political climate of the nation, the sentiment has not wavered.⁴ In order to implement the country's will, Congress has relied upon an arm of the federal government specifically intended to administer programs for veterans. In its most recent iteration, this agency is known as the Department of Veterans Affairs.⁵

In order to administer veterans benefits in a manner most beneficial for the veteran, Congress has provided several statutory mechanisms which are intended to lessen the burden on a veteran applying for benefits.⁶ One of the most important hallmarks of this structure is that the VA is a non-adversarial system where no one technically represents the position of the Secretary of the VA against a veteran until the appeals portion of the process in court.⁷ Indeed, many of the procedural mechanisms in the system place a burden on the VA itself to help a veteran in his application for benefits.⁸ Another important guarantee of the system is that if all evidence in a veteran's claim is in equipoise, meaning that there is a balance of the positive and negative evidence regarding a veteran's claim, the VA will grant the veteran the benefit of the doubt and decide in the veteran's favor when determining entitlement to the benefit.⁹ The third guarantee of the system is that the VA has a duty to assist a veteran throughout the process of filing a claim, therefore in Congress' belief, obviating the need for legal representation until later stages of the process.¹⁰

In 2000, Congress codified these procedural assistances,¹¹ but even before their actual codification, it was widely known that the VA had for

4. See James D. Ridgway, *supra* note 3, at 135, 217–19 (“[T]he history of veterans’ benefits is much more checkered and conflicted than might be suggested by slogans welcoming home the nation’s heroes.”).

5. U.S. DEP’T OF VETERANS AFFAIRS, VETERANS BENEFITS ADMINISTRATION (2015), <http://www.benefits.va.gov/benefits/about.asp>.

6. Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (2000) (codified as amended at 38 U.S.C. §§ 5100–5107 (2012)).

7. See *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 323–24 (1985) (“[S]urely Congress desired that the proceedings be as informal and nonadversarial as possible.”).

8. See Veterans Claims Assistance Act of 2000 §§ 5100–5107 (showing the burdens placed on the VA such as “Duty to Assist”).

9. *Hodge v. West*, 155 F.3d 1356, 1362–63 (Fed. Cir. 1998) (citing H.R. REP. NO. 100-963, at 13 (1988)); see *Gilbert v. Derwinski*, 1 Vet. App. 49, 54 (1990); 38 U.S.C. § 5107 (2012); 38 C.F.R. § 3.102 (2016).

10. 38 U.S.C. § 5103(a) (2012). See also *Walters*, 473 U.S. at 335 (holding a \$10.00 limit on the fee that may be paid to an attorney who represents a veteran seeking benefits from the VA is constitutional). But see *Jaquay v. Principi*, 304 F.3d 1276, 1282 (Fed. Cir. 2002) (“[T]he law prohibiting lawyers from charging a fee has the principal effect of limiting the ability of veterans to retain a lawyer at the early stages of the claim process.”).

11. 38 U.S.C. §§ 5100–07.

many decades attempted to operate in this non-adversarial, veteran friendly manner.¹²

The VA provides veterans with many different types of benefits ranging from education benefits to burial payments.¹³ The most used benefit that the VA offers is disability compensation.¹⁴ Over four million veterans draw a disability benefit from the VA, comprising \$60.21 billion of the VA's budget for 2015.¹⁵ These disability benefits are sent to the veteran monthly in the form of a non-taxable check, with amounts that vary depending on the severity of the veteran's disability conditions.¹⁶ Generally, the payments range from \$133 to \$2906 a month for a veteran with no dependents.¹⁷

In order to be qualified to receive the disability benefit, a veteran must demonstrate that she presently suffers from a disability that was caused (or aggravated) by her active military service.¹⁸ Because this benefit relies heavily on the medical condition of the veteran and injuries or diseases incurred during service, medical evidence is almost always necessary in order to prove both the nature of the present disability and the connection of that disability to service.¹⁹

12. *See id.* (stating that the purpose of the Act is “to reaffirm and clarify the duty of the Secretary of Veterans Affairs to assist claimants”). *See also* S. REP. NO. 106-397, at 23 (2000) (“The above delineation of VA—and claimant—obligations captures the Committee’s understanding of the assistance VA had . . . historically provided to claimants seeking disability compensation.”).

13. 38 C.F.R. pts. 3, 21 & 36.

14. U.S. DEP’T OF VETERANS AFFAIRS, COMPENSATION: SERVICE-CONNECTED DISABILITY OR DEATH BENEFITS (2016), <http://www.benefits.va.gov/REPORTS/abr/ABR-Compensation-FY15-05092016.pdf> [hereinafter COMPENSATION].

15. *Id.* at 5.

16. *Id.* at 1.

17. U.S. DEP’T OF VETERANS AFFAIRS, COMPENSATION (2016), http://www.benefits.va.gov/COMPENSATION/resources_comp01.asp.

18. *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff’d*, 78 F.3d 604 (Fed. Cir. 1996) (citing *Brammer v. Derwinski*, 3 Vet. App. 223 (1992); *Cartright v. Derwinski*, 2 Vet. App. 24 (1991); *Grottveit v. Brown*, 5 Vet. App. 91 (1993), *abrogated by* *Edenfield v. Brown*, 8 Vet. App. 384 (1995); *Lathan v. Brown*, 7 Vet. App. 359 (1995); *Layno v. Brown*, 6 Vet. App. 465 (1994); *Rabideau v. Derwinski*, 2 Vet. App. 141 (1992)).

19. *See Caluza*, 7 Vet. App. at 504 (noting that an exception to the need for medical evidence occurs in cases where lay testimony is sufficient to satisfy these requirements, such as cases where a layperson could make an obvious medical diagnosis). *See also* *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007) (explaining that lay evidence can be “competent and sufficient to establish a diagnosis” in certain situations).

III. MEDICAL EXAMINATIONS

One of the VA's statutorily mandated duties to assist is the duty to help a veteran obtain medical evidence to prove his claim by providing a medical examination for the veteran.²⁰ The VA must provide a medical examination for a veteran whenever the veteran provides competent evidence of persistent or recurrent symptoms of a disability or a diagnosis of a disability, evidence of an in-service event, an indication that the symptoms or disability may be associated with the in-service event, or insufficient evidence for the VA to render a decision on the claim.²¹

The VA uses either medical employees of the Veterans Health Administration, the arm of the VA that runs the medical centers and clinics providing health care to veterans, or contracted medical professionals to do these examinations.²² The examinations themselves are called Compensation & Pension examinations, or C&P examinations.²³ The purpose of these examinations is to examine the veteran's claimed current disability, provide a diagnosis of the condition if possible, provide an opinion about the etiology of the condition, and provide an opinion concerning the severity of the condition.²⁴

Veterans may also provide their own private medical opinions concerning the diagnosis, etiology, and severity of a claimed condition.²⁵ These opinions will be given the same weight as a VA medical opinion, assuming they appear to be competent and informed opinions.²⁶

20. 38 U.S.C. § 5103A(d) (2012); 38 C.F.R. § 3.159(c)(4) (2016).

21. 38 C.F.R. § 3.159(c)(4); *McLendon v. Nicholson*, 20 Vet. App. 79, 81 (2006).

22. VA OFFICE OF INSPECTOR GEN., 09-02135-107, DEP'T OF VETERANS AFFAIRS AUDIT OF VA'S EFFORTS TO PROVIDE TIMELY COMPENSATION AND PENSION MEDICAL EXAMINATIONS 1 (2010).

23. *Id.* at i.

24. *See Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 300-01 (2008) (stating that the VA must provide an adequate examination with a reasoned medical explanation for any determinations made). *See also* U.S. DEP'T OF VETERANS AFFAIRS, M21-1 ADJUDICATION PROCEDURES MANUAL, pt. III(iv), ch. 3, § D(2)(I) (2016), http://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ss/#!/portal/554400000001018/article/554400000015812/M21-1-Part-III-Subpart-iv-Chapter-3-Section-D-Examination-Reports (explaining that the VA's examinations require the use of a DBQ, which includes "a diagnosis section, medical history, objective findings, results of diagnostic testing performed, and a remarks section for any necessary explanation").

25. *Nieves-Rodriguez*, 22 Vet. App. at 301 (citing 38 U.S.C. § 5125 (2012)).

26. *See* 38 U.S.C. § 5107(b) (2012) ("When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.").

C&P examiners use the “disability questionnaire” (DBQ) for most of the conditions they examine.²⁷ The DBQ is also available for private physician use as well.²⁸ The DBQ was created to ask standardized questions for each type of condition to ensure that examinations are thorough and complete, answering all questions necessary for the VA to determine whether or not a condition is connected to a veteran’s service.²⁹

When C&P examinations are conducted, the examiner may either meet with the veteran in person or provide a records review, depending on the type of opinion requested from the VA.³⁰ The veteran’s entire VA file, to include records of medical treatment during the veteran’s service, VA medical records of treatment, private treatment records, and other pertinent records such as Social Security disability examinations are available to the C&P examiner.³¹ While the C&P examiner is not required to review all of the veteran’s files, reviewing these materials helps the examiner to make a more informed and comprehensive medical opinion regarding diagnosis, etiology, and severity of a condition.³²

In addition to C&P examination results, the VA is also required to review private medical evidence offered by a veteran in order to evaluate whether the evidence is helpful in determining a veteran’s claim for benefits.³³

27. See VA OFFICE OF INSPECTOR GEN., 11–00733–95, DEP’T OF VETERANS AFFAIRS AUDIT OF VA’S INTERNAL CONTROLS OVER THE USE OF DISABILITY BENEFITS QUESTIONNAIRES 4 (2012) (explaining that disability benefit questionnaires were implemented by the VA to replace C&P examination report templates).

28. *Id.* at 1.

29. See *id.* (“DBQ’s are condition-specific forms designed to capture medical information relevant to veterans’ disability benefit claims.”).

30. 38 U.S.C. § 5103A(d) (2012); 38 C.F.R. § 3.159(c)(4) (2016); *VHA Directive 2012–025, Acceptable Clinical Evidence (ACE) to Support the Compensation and Pension (C&P) Disability Evaluation Process*, U.S. DEP’T OF VETERANS AFFAIRS VETERANS HEALTH ADMIN. (Sept. 17, 2012), <http://www.va.gov/vhapublications/publications.cfm?pub=1>.

31. 38 U.S.C. § 5103A(c) (2012); 38 C.F.R. § 3.159(c)(1)–(3); U.S. DEP’T OF VETERANS AFFAIRS, M21-1 ADJUDICATION PROCEDURES MANUAL, pt. III(iv), ch. 3, § A(15)(a)–(b), http://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ss/#!/portal/55440000001018/article/554400000015809/M21-1-Part-III-Subpart-iv-Chapter-3-Section-A-Examination-Requests-Overview.

32. *Nieves-Rodriguez*, 22 Vet. App. at 303–04.

33. 38 C.F.R. § 4.2 (2016).

IV. DIFFICULTIES WITH MEDICAL EVIDENCE

While there are a number of issues contributing to the difficulty for the VA in delivering disability benefits to veterans, the quality of the medical evidence reviewed by the VA is one of the major contributors to this situation. There are three main problems regarding medical evidence in the VA benefits system. First, the medical examinations provided by the VA are often inadequate for purposes of rating a veteran's conditions.³⁴ Second, private doctors are often untrained regarding the VA standards for evaluating disabilities for benefits purposes, so they are not providing veterans with the most helpful or effective medical examinations.³⁵ Third, the employees at the VA who are positioned as the gatekeepers of adequate medical evidence are given such a difficult job they often are unable to complete the job sufficiently.³⁶

V. INADEQUATE VA-PROVIDED MEDICAL EXAMINATIONS

The VA is required to provide a veteran with a medical examination that is adequate.³⁷ Among other things, an adequate medical examination requires:

... that it is "essential, both in the examination and in the evaluation of disability, that each disability be viewed in relation to its history." Further, "[i]f a diagnosis is not supported by the findings on the examination report or if the report does not contain sufficient detail, it is incumbent upon the rating board to return the report as inadequate for rating purposes." It is also well established . . . that a thorough and contemporaneous medical examination is "one which takes into account the records of prior medical treatment, so that the evaluation of the claimed disability will be a fully informed one."³⁸

Despite the requirement for adequate medical examinations, inadequate examinations occur on a regular basis. It is a well-recognized problem within the VA itself. For instance, the Executive in Charge of the Board of

34. *See infra* Part V.

35. *See infra* Part VI.

36. *See infra* Part VII.

37. *Nieves-Rodriguez*, 22 Vet. App. at 298–99 (citing 38 U.S.C. § 5103A(d)(1) (2012); *McLendon v. Nicholson*, 20 Vet. App. 79, 81 (2006); 38 C.F.R. § 3.159(c)(4) (2008)).

38. *Nieves-Rodriguez*, 22 Vet. App. at 301 (quoting *Green v. Derwinski*, 1 Vet. App. 121, 123 (1991)).

Veterans' Appeals, the first administrative law judges within the VA to hear appeals of decisions on veterans' claims, testified to Congress about the effect of these inadequate examinations on VA decisions. "The adequacy of medical examinations and opinions, such as those with incomplete findings or supporting rationale for an opinion, has remained one of the most frequent reasons for remand."³⁹

Recently, Diane Boyd Rauber, the Executive Director of the National Organization of Veterans Advocates testified before Congress about the prevalence of inadequate examinations within the VA.

(In 2015), the Subcommittee on Disability Assistance and Memorial Affairs requested appeals data from VA, to include the top five remand reasons for the six fiscal years between 2009-2014. While not particularly detailed, in five of the six years, "nexus opinion" was listed as a top five reason. Other consistently reported reasons included "incomplete/inadequate findings," "current findings (medical examination/opinion)," and "no VA examination conducted." While VA often cites the veteran's submission of evidence as triggering the need for additional development, the reality is VA has consistently demonstrated difficulty fulfilling its fundamental obligation to provide veterans with adequate medical examinations and opinions in the first instance.⁴⁰

This failure to administer adequate medical examinations is often seen in the examinations for the commonly claimed condition, Post-Traumatic Stress Disorder (PTSD). The manner in which the VA provides C&P evaluations for this condition exposes the tension in the VA system that finds itself attempting to push claims through the process more quickly by failing to ensure, or in some cases permit, a VA examiner to spend adequate time evaluating the veteran's medical conditions.

39. *Why Are Veterans Waiting Years on Appeal?: A Review of the Post-Decision Process for Appealed Veterans' Disability Benefits Claims: Hearing Before the Subcommittee on Disability Assistance and Memorial Affairs of the House Committee on Veterans' Affairs*, 113th Cong. 1st Sess. 23 (2013) (statement of Laura H. Eskenaki, Executive in Charge, Board of Veterans' Appeals).

40. *Pending Legislation, Hearing Before the Senate Committee on Veterans' Affairs*, 114th Congress, 2nd Sess. 10 (2016) (statement of Diane Boyd Rauber, Executive Director, National Organization of Veterans Advocates, citing Department of Veterans Affairs (VA) Appeals Data Requested by House Committee on Veterans' Affairs Subcommittee on Disability Assistance and Memorial Affairs (January 2015)).

For example, in fiscal year 2015, the VA granted service connection to 63,049 veterans for PTSD.⁴¹ This does not account for the number of PTSD claims filed by veterans and worked on by the VA, merely the number of connections granted. The number of actual claims for PTSD is not presented in VA reports, but should be considered to be much higher than the number of PTSD claims granted. For a majority of the claims for PTSD, the VA has likely granted a C&P examination to a veteran.

Knowing that PTSD is a condition claimed by many veterans, and in response to VA internal audits on the effectiveness of PTSD C&P examinations conducted by VA examiners, the VA published the “Best Practice Manual for Posttraumatic Stress Disorder (PTSD) Compensation and Pension Examinations.”⁴² The purpose of this manual is to raise the quality of medical examinations being conducted by VA examiners and sent to rating officials at the VA.⁴³ The manual suggests that increasing the adequacy of examinations will require an increase in time allocated for these exams.⁴⁴ For instance, an appropriate amount of time to spend in an initial meeting with a veteran regarding a PTSD C&P examination is approximately three hours, with complex cases taking more time.⁴⁵ One C&P examiner in North Carolina notes that because these examinations are intended to be like forensic evaluations, the examiners may need three to six hours to conduct a PTSD C&P exam.⁴⁶

However, the various VA offices hiring C&P examiners appear to either not know or not care about the best practices standards for ensuring adequate medical examinations. Consider that in February 2015, the VA office in East Orange, NJ, advertised to fill a C&P psychological examiner position requiring the employee to conduct six examinations a day which would require the examiner to “review the claims file, medical record, and associated background materials, perform the examination of the patient as requested by Newark Regional Office of Veterans Benefits Administration (VBA), and complete documentation of the examination by dictation or by

41. COMPENSATION, *supra* note 14, at 30.

42. See Patricia Watson et al., *Best Practice Manual for Posttraumatic Stress Disorder (PTSD) Compensation and Pension Examinations*, U.S. DEP’T OF VETERANS AFFAIRS (2016), <http://www.avapl.org/pub/PTSD%20Manual%20final%206.pdf> (providing information on PTSD and current recommendations regarding best practices for assessing PTSD among veterans).

43. *Id.* at 1.

44. *Id.* at 2.

45. *Id.*

46. Mark D. Worthen & Robert G. Moering, *A Practical Guide to Conducting VA Compensation and Pension Exams for PTSD and Other Mental Disorders*, 4 PSYCHOL. INJURY AND LAW 187, 193 (2011).

typing within 24 hours.”⁴⁷ Assuming the C&P examiner worked after hours on the documentation of the examination and the review of all records, the maximum amount of time the examiner could spend with a veteran in an interview would be a little less than an hour and a half.

The Nevada VA office put out an advertisement in August 2016 for a C&P examiner psychology position that required the examiner to conduct an average of three appointments per day.⁴⁸ While this is much better than six in a day, this number of appointments still does not allow the C&P examiner enough time to meet the VA’s best practices for C&P Examinations for PTSD, particularly if the examination is for a complex PTSD issue. In addition to meeting with the veteran during these evaluations, the examiner is also expected to “review the claims file, medical record, and associated background materials . . . and complete documentation of the examination.”⁴⁹

It is acknowledged that asking C&P examiners to comply with best practices and take adequate time with each veteran would mean conducting only two C&P examinations a day.⁵⁰ This change in capacity would likely cause a drain on the system, which is already feeling a strain and delay in the adjudication of claims. However, in order to give veterans an adequate examination to comply with the law, the system demands this type of attention be given to each case.

Another example of problems with adequacy of C&P examinations can be found in complex evaluations of PTSD as the result of military sexual trauma (MST). MST refers to “a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment which occurred while the veteran was serving on active duty, active duty for training, or inactive duty training.”⁵¹ A recent study done by the Government Accountability Office of MST medical evaluations found that the depth of the examination provided to a veteran varied greatly depending on the C&P examiner.⁵² The majority

47. GOCENTERJOBS.COM, http://www.gocenterjobs.com/view.php?job_id=53013&type=search&auth_sess=fa88dc9babacf0decf71c5380f96b818&ref=4c440293b61a0e03820758df8 (last visited Oct. 11, 2016).

48. CLINICAL PSYCHOLOGIST-COMPENSATION & PENSION (C&P), USAJOBS, <https://www.usajobs.gov/GetJob/ViewDetails/448169000/> (last visited Oct. 11, 2016).

49. *Id.*

50. *See* Worthen & Moering, *supra* note 46, at 193 (stating that the recommended time for exams is at least three hours).

51. 38 U.S.C. § 1720D(a)(1) (Supp. II 2014).

52. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-14-477, MILITARY SEXUAL TRAUMA: IMPROVEMENTS MADE, BUT VA CAN DO MORE TO TRACK AND IMPROVE THE CONSISTENCY OF DISABILITY CLAIM DECISIONS 18 (2014).

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of medical examiners interviewed by the GAO expressed concern at the variance in this thoroughness with one examiner reporting that some “examiners . . . complete exams in fifteen minutes whereas she said it should take multiple hours, if done correctly.”⁵³ The end result of these inadequate examinations can be that crucial evidence is missed that may prove or disprove a veteran’s claim.

The amount of time being taken by C&P examiners to fully address a veteran’s claimed conditions is noticed not only by the examiners themselves, but also by the VA employees tasked with receiving, evaluating, and implementing the C&P examination to determine a veteran’s entitlement for benefits. During a 2014 congressional hearing, one VA employee whistleblower noted that “(w)e receive exams from VHA (C&P examiners) not properly filled out, missing medical opinions, with conflicting opinions and diagnosis, and incomplete. We complained to our managers but get no address to this problem. We also receive complaints from veterans on being evaluated for complex conditions in “five minutes.”⁵⁴

The inadequacy of the examination may also stem from the credentials of the examiner herself. In June 2016, following an investigative report by a news station in Minnesota, the VA publicly announced that over 24,000 veterans had received traumatic brain injury C&P examinations by examiners who were not qualified to administer those examinations.⁵⁵ Jason Quick, a representative of Concerned Veterans For America, makes it clear why these types of mistakes are bigger than just determining if a veteran is entitled to disability benefits:

To me, it’s more than just a mistake . . . Unemployment, things like veteran suicide. You think about how the effects of a misdiagnosed or undiagnosed traumatic brain injury could be affecting a veteran. A lot of veterans come home from service and they want to transition to civilian life. They want to transition into a new career

53. *Id.* at 18.

54. *Evaluation of the Process to Achieve VBA Goals: Hearing Before the H. Comm. on Veterans’ Affairs*, 113th Cong. 4 (2014) (statement of Javier Soto, Former Rating Veterans Service Representative, St. Petersburg Regional Office of the Dept. of Veterans Affairs).

55. Steven Eckert & A.J. Lagoe, *Invisible Wounds: A Report on the VA and Vets With Traumatic Brain Injuries* (June 2016), <http://www.kare11.com/news/investigations/invisible-wounds-a-report-on-the-va-and-vets-with-traumatic-brain-injuries/215102774>; *Hearing Before the Subcomm. on Disability Assistance and Mem’l Affairs of the H. Comm. on Veterans’ Affairs*, 114th Cong. 1 (2016) (statement of Dave McLenachen, Deputy Undersecretary for Disability Assistance, Department of Veterans Affairs).

or maybe go to school. A traumatic brain injury really throws all of that stuff out of whack.⁵⁶

Finally, there is something to be said for the tension within the VA itself regarding the role of C&P examiners within the larger context of the non-adversarial relationship between the VA and the veteran. In an article written by two VA C&P Examiners, the doctors discuss this tension in regards to the “benefit of the doubt standard,”⁵⁷ which as discussed above, is the hallmark of the non-adversarial veterans system.⁵⁸ These doctors relay the story of one VA C&P examiner who was advised by the VARO to refrain from administering a “malingerer” test to a veteran during a PTSD examination because these tests did not give a veteran the “benefit of the doubt”.⁵⁹

From a professional perspective, examiners have an obligation to conduct a fair, balanced, and impartial evaluation. A misguided attempt to give the veteran the benefit of the doubt ignores the facts, namely that there is an incentive to exaggerate or feign given the monetary reward for successfully fooling an examiner and receiving disability benefits. To ignore this incentive is naïve and unscientific as it denies the abundant scientific evidence to the contrary.⁶⁰

The doctors go on to note that failing to affirmatively seek out those who may be making up their symptoms in order to obtain monetary benefits is a violation of their ethical duties and a “waste of taxpayer dollars” that “contributes to the national debt.”⁶¹ It is hard to disagree that some people may have the incentive to lie in order to gain benefits. It is obvious from these comments however, that the C&P examiners themselves may sometimes be operating from the wrong starting point when it comes to veterans benefits. The entire system is meant to be non-adversarial to a veteran. Everything in that system is built upon this premise because the

56. Nate Morabito, *After VA Failure, Nearly 25,000 Veterans Eligible For New Brain Exams* (July 6, 2016, 6:03 PM), <http://wjhl.com/2016/07/06/after-va-failure-nearly-25000-veterans-eligible-for-new-brain-exams/>.

57. See 38 U.S.C. § 5107(b) (2012) (noting that in evaluating a veteran’s claim, “[w]hen there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant”).

58. Worthen & Moering, *supra* note 46, at 188.

59. *Id.* at 198.

60. *Id.* at 197.

61. *Id.* at 198.

nation has decided that veterans are unique.⁶² They get special rules and special considerations, and in return, the veteran gives up the right to hire legal counsel in these first stages of the process.⁶³ To enter into a veteran's C&P examination with the mindset that one must root out the liars in order to protect the integrity of the system is to misunderstand the system itself. One must wonder how many C&P examiners feel this way and how much this colors or biases the decisions made in these examinations.

VI. INADEQUATE PRIVATE MEDICAL EXAMINATIONS

Medical examinations are difficult enough for VA examiners who are pressed to spend less and less time reviewing a veteran's claims and may not quite understand the nuances of the system themselves. Private practitioners also feel the pain of working within the VA system without experience or training in what the VA needs in order to process a claim for benefits.

The VA has created forms designed for use by VHA providers and private medical providers "to streamline the process of providing examinations in support of veterans' claims for disability benefits."⁶⁴ These forms, called Disability Benefits Questionnaires (DBQs), are "condition-specific medical forms" used to aide an examiner in recording all of the information necessary for the VA to make a determination for benefits.⁶⁵ The DBQ is meant to serve as a substitute for the C&P Examination.⁶⁶

An audit of the DBQ system in 2016, after the DBQ program had been implemented for six years, found that for veterans turning in DBQs as medical evidence, the likelihood of these documents being associated with their claims was very low.⁶⁷ For instance, the VA reported that 255 claims were supported by the veteran's submission of a private doctor DBQ.⁶⁸ However, the VA Inspector General found that this accounted for only 7% of the true number of claims where DBQs were sent in as supporting medical evidence.⁶⁹ 93% of the 24,700 claims where a veteran had submitted

62. *Id.* at 188.

63. 38 U.S.C. § 5904(c)(2) (2012); *see Walters*, 473 U.S. at 323 (noting that Congress' desire in limiting access to attorneys in the initial stages of the claims process is based on the belief that the system should be informational and non-adversarial for veterans).

64. VA OFFICE OF INSPECTOR GEN., VAOIG-14-02384-45, VETERANS BENEFITS ADMINISTRATION: FOLLOW-UP AUDIT OF INTERNAL CONTROLS OVER DISABILITY BENEFITS QUESTIONNAIRES 21 (2012).

65. *Id.*

66. *Id.*

67. VA OFFICE OF INSPECTOR GEN., *supra* note 64, at 1.

68. *Id.*

69. *Id.*

a DBQ did not reflect that the medical evidence was part of the veteran's claim.⁷⁰ For those veterans who do pay private physicians to complete DBQs to support the veterans' claims, the VA has also been needlessly ordering C&P examinations costing taxpayers \$2.4 million during the same six month period and making 7,100 veterans wait unnecessarily for decisions on their claims.⁷¹

Additionally, VA rating officials are having the same difficulties with private doctors as they have with VA C&P examiners in obtaining complete medical information during these examinations. During a six month period, the VA relied on approximately 10,400 inadequate or incomplete medical examinations when determining a veteran's benefits.⁷² Additionally, the VA audit revealed that the VA was also not doing a particularly good job of weeding out what may be fraudulent DBQs from the system.⁷³ For a full 37% of the DBQs reviewed, the examiner failed to provide complete information on his certification and signature in order for the VA to verify the veracity of the DBQ reports.⁷⁴

There is no systematic training program for private doctors in the method and manner of documenting a medical examination in a DBQ. Additionally, the DBQs do not ask the private doctor to provide an opinion on the etiology of a disability, which is often the disputed element preventing a veteran from establishing entitlement to a disability benefit.⁷⁵ The private medical evaluations can often be of limited use to the VA if the private doctors enter this arena uninformed and the appropriate follow up questions are not asked in order to help the doctor give the VA the necessary information to decide a veteran's claim.

70. *Id.*

71. *Id.*

72. *Id.* at 2.

73. *Id.*

74. *Id.* at 6.

75. See, e.g., U.S. DEP'T OF VETERANS AFFAIRS, REVIEW POST TRAUMATIC STRESS DISORDER (PTSD) DISABILITY BENEFITS QUESTIONNAIRE (2015), <http://www.vba.va.gov/pubs/forms/VBA-21-0960P-3-ARE.pdf>; U.S. DEP'T OF VETERANS AFFAIRS, NECK (CERVICAL SPINE) CONDITIONS DISABILITY BENEFITS QUESTIONNAIRE (2013), <http://www.vba.va.gov/pubs/forms/VBA-21-0960M-13-ARE.pdf>; Catherine Trombley, *Getting Your Claim Processed Favorably and Quickly: Some Helpful Hints*, U.S. DEP'T OF VETERANS AFFAIRS: VANTAGE POINT (August 1, 2012, 5:01 PM), <http://www.blogs.va.gov/VAntage/7769/getting-your-claim-processed-favorably-and-quickly-some-helpful-hints/> (describing that when reviewing a claim, Veterans Service Representatives often question the cause of the particular disability).

VII. DIFFICULTIES FOR RATERS IMPLEMENTING THE MEDICAL EXAMINATION SYSTEM

VA employees determining a veteran's entitlement to disability compensation benefits are tasked with the monumental job of second-guessing a medical professional.⁷⁶ VA employees assigned to read the medical examinations and interpret them when determining service connection and assigning a level of severity are not normally medical or legal professionals. These employees are often entry-level employees paid between \$40,000 and \$52,000 a year and may or may not have a bachelor's degree.⁷⁷ VA regulation places an inordinate amount of technical understanding and capability on these employees. For example, consider 38 C.F.R. § 4.2, Interpretation of Examination Reports:

Different examiners, at different times, will not describe the same disability in the same language. Features of the disability which must have persisted unchanged may be overlooked or a change for the better or worse may not be accurately appreciated or described. *It is the responsibility of the rating specialist to interpret reports of examination in the light of the whole recorded history, reconciling the various reports into a consistent picture so that the current rating may accurately reflect the elements of disability present.* Each disability must be considered from the point of view of the veteran working or seeking work. *If a diagnosis is not supported by the findings on the examination report or if the report does not contain sufficient detail, it is incumbent upon the rating board to return the report as inadequate for evaluation purposes* (emphasis added).⁷⁸

38 C.F.R. § 4.2 is an example of the problem that inadequate examinations exacerbate. Rating officials, with no technical medical or legal expertise or training, are required to reconcile different language of different examiners in order to determine the nature and severity of a condition that may not be clear.⁷⁹ They are also required to view the entire history of the

76. 38 C.F.R. § 4.2 (2016).

77. VETERANS SERVICE REPRESENTATIVE, USAJOBS, <https://www.usajobs.gov/GetJob/ViewDetails/449298100/> (last visited Oct. 12, 2016).

78. 38 C.F.R. § 4.2 (2016).

79. *Rating Veterans Service Representative*, U.S. DEP'T OF VETERANS AFFAIRS, <https://mycareeratva.va.gov/careers/career/099604#education-licensure>.

veteran and his disability as a whole and reconcile those parts of the medical record that may not be reconcilable into one consistent explanation of the veteran's disability.⁸⁰ Finally, the rating official must determine if the examining medical professional did their job by appropriately identifying, describing, and diagnosing a condition and whether or not the diagnosis is supported by the medical evidence.⁸¹ It is a difficult task to find expert witnesses who can do this type of forensic analysis of another doctor's medical work, much less to ask a non-specialized, overworked VA employee to do it. When VA employees are confronted with inadequate medical examinations, their task is that much more difficult to accomplish.

Add to this dilemma that the Court of Appeals for Veterans Claims (CAVC) regularly provides guidance through case law on the adequacy of medical examinations and the requirements that certain things be addressed by examining providers, and the problem is exacerbated. For instance, in 1995, the CAVC decided the case *DeLuca v. Brown*,⁸² which held generally that the VA must account for the pain and weakness a veteran is experiencing in addition to range of motion limitations when evaluating disability claims involving the joints of the body.⁸³ In order to account for these types of effects, the C&P medical examination must inquire into these types of limitations and take them into account when discussing the severity and etiology of a disabling condition.⁸⁴ Seven years after this decision, the VA found that 61% of the C&P examinations done on the joints did not comply with the requirements of the *DeLuca* decision.⁸⁵

VIII. CASE STUDY

Understanding the difficulties regarding medical evidence in VA disability claims may be easier with the help of an example. Joe came into the Stetson University College of Law's Veterans Advocacy Clinic as a referral from his local congressman's office. Joe had been homeless at least twice in the past two years and had just been stabilized in housing subsidized by the VA. Due to the precarious nature of his housing situation, Joe was

80. 38 C.F.R. § 4.2 (2016).

81. *Id.*

82. *DeLuca v. Brown*, 8 Vet. App. 202, 207 (1995).

83. *Id.*

84. *VA Could Enhance Its Progress In Complying with Court Decision on Disability Criteria 2*, U.S. GOV'T ACCOUNTABILITY OFFICE (Oct. 2005), <http://www.gao.gov/assets/250/248132.pdf>.

85. *Eye Conditions Disability Benefits Questionnaire 10*, U.S. DEP'T OF VETERANS AFFAIRS (2014), <http://www.vba.va.gov/pubs/forms/VBA-21-0960N-2-ARE.pdf>.

particularly anxious to receive his disability compensation benefits from the VA.

Joe had been injured in service while riding on a helicopter in Iraq. He had been wearing night vision goggles when the buckle of his seatbelt came loose and flew into Joe's face in mid-flight knocking his goggles into his eye. This resulted in a traumatic cataract injury that required Joe to be medevac'd out of Iraq in order to operate on the condition. When Joe was discharged from service, his sight in his left eye worsened. He began to see different colored tints in his vision, floating specks across his field of vision, and noticed that he had significant depth perception issues. He was unable to estimate the proximity of furniture for instance and often bumped into things while walking or placed cups down where he thought a table was, missing the table and dropping the cup to the floor. Eventually Joe could no longer drive, which meant he was also hindered in his ability to find work. Unemployment ultimately led to his homelessness. Joe had been visiting the eye clinic at his local VA medical center and these symptoms had been documented in his medical records although they had not been diagnosed, nor had they been addressed for treatment purposes. Eventually, Joe stopped going to the eye clinic because they were unable to offer help.

Joe filed a claim for his eye condition. The medical examination Joe was given by the VA's C&P examiner included administering Joe a standard Snellen Chart vision test. This test indicated that Joe's eyes were fine to read the letter chart on the wall with glasses, but did not address his depth perception issues and other vision problems. Joe relayed that the examination lasted for 20 minutes and the examiner did not ask Joe any questions concerning vision problems beyond the eye chart vision test. Joe did not offer information because he assumed the doctor had read his medical records before the examination. The VA ultimately decided that Joe's vision was fine.

Students at Stetson's Veterans Advocacy Clinic believed that there must be more to Joe's eye issue, but could not decipher the medical records and tests sufficiently to determine what might be wrong. The law students reached out to a part-time law student on Stetson's campus, who also happened to be a medical doctor, in order to seek some guidance. The doctor donated his time to the clinic to sit with law students helping them to read through eye examination records and determine what testing might need to be done for Joe. Based upon the doctor's advice, the law students reached out to the University of South Florida's (USF) Morsani College of Medicine, Department of Ophthalmology. Stetson's College of Law and USF's Morsani College of Medicine have created a unique relationship allowing Stetson to refer veterans to the College of Medicine in order to obtain medical evaluations for purposes of veterans benefits claims.

Joe saw three specialists in the Ophthalmology department who identified Joe's vision issue after specialized testing as a condition which occurs post-cataract surgery. Joe was able to take these specialized tests to the VA medical center in order to get appropriate treatment for the condition that would allow him to begin driving again. The medical diagnosis provided by USF was also provided to the VA in order to supply evidence to support Joe's claim that he did indeed have a serious condition with visual defects in his eye. Joe's evidence was sent to the VA in June of 2015. A year later, Joe was still waiting for the VA to review his new medical evidence and make a decision regarding his entitlement to benefits for this disability.

IX. GAPS IN THE SYSTEM

Joe's story is a good example of the complexity a veteran may face to obtain medical evidence regarding a disability and also illustrates many of the concerns with the system previously discussed.

There was no question that Joe had suffered an eye injury in service. Joe's only available medical care was at his local VA medical center, which recorded his symptoms, but did not do any specialized testing nor send him out to have any done at an equipped facility. The C&P examiner spent little time talking to Joe, despite the fact that the DBQ for eye exams should take 45 minutes for an examiner to complete.⁸⁶ Additionally, there are several questions after the Snellen eye examination that the C&P examiner should answer regarding other irregularities with the eye including asking if the veteran suffers a "visual field defect."⁸⁷ If the answer to this question is "Yes," the veteran should be given more specialized testing.⁸⁸ Each time Joe was seen for this condition by a C&P examiner, the examiner checked "No" in response to the question "does the veteran have a visual field defect?" This is just one example of a situation where the examiner did not carefully review a veteran's records, if they were reviewed at all, because the examiner did not even see the eye clinic treatment records indicating he suffered from numerous symptoms of a serious condition. This may have been remedied if the C&P examiner asked Joe about his symptoms, but because the examiner did not ask questions, he missed the fact that Joe does

86. *Id.*

87. *Id.*

88. See Sashank Prasad, M.D., *Visual Field Deficits*, BRIGHAM AND WOMEN'S HOSPITAL (Mar. 11, 2016), http://www.brighamandwomens.org/Departments_and_Services/neurology/services/NeuroOphthalmology/VisualFieldDeficits.aspx (explaining that physicians should ask patients to describe their symptoms to determine if further testing is necessary).

indeed suffer from visual field defects and should have been given more specialized testing to determine the nature of the condition.⁸⁹

More significantly for Joe, the relationship between Stetson University College of Law's Veterans Advocacy Clinic and USF's Morsani College of Medicine allowed law students and faculty to walk medical faculty through the questions the VA would ask regarding Joe's condition, the questions regarding Joe's severity that needed to be answered, and the burden of proof on Joe in his claim. The medical faculty's better understanding of the process helped them to pinpoint Joe's conditions and provide information that would make it easier for VA medical and benefits personnel to address these issues.

Joe's case, while complex, is certainly not the most complicated that C&P examiners encounter. However, many of the issues that have already been discussed regarding the inadequacies in the system regarding medical evidence are found lurking beneath the surface of Joe's C&P examination and ultimately the decision the VA made regarding the severity of his eye conditions.

X. FIXING THE PROBLEMS

As has been demonstrated, the VA's system for providing medical evidence evaluations, using private medical examinations, and interpreting examinations has significant gaps where errors may be made in the evaluation of veterans. There are potentially many ways to alleviate the pressure on the medical evidence system, but one proven way is to provide medical evaluations through medical providers who are trained in both the legal and medical requirements of an examination, such as in a medical-legal partnership.

There are many different ways to provide services through a medical-legal partnership in order to ensure that veterans have the most complete and accurate medical evaluations and evidence possible. One way to provide this type of service to the veteran is the medical-legal partnership model that Stetson University College of Law and the University of South Florida are using to much success. This partnership, created in 2014, allows law students and law faculty representing veterans in the veterans disability compensation process to collaborate with medical students and medical faculty at the Morsani College of Medicine in order to provide evaluations and medical opinions regarding the diagnosis, etiology, and severity of a

89. Collaboration Agreement Between Stetson Univ. Coll. of Law and Univ. of S. Fla. Health to Serve Fla.'s Veterans 1 (Sept. 25, 2014) (on file with author).

veteran's disabilities.⁹⁰ The law students help to train medical students and faculty in the requirements the VA has regarding proving entitlement to benefits. The medical faculty at USF become much more familiar with the types of issues and clients they will be seeing for these evaluations and understand what types of evidence and evaluation the VA requires. The veteran wins in this scenario because she gets thorough diagnosis and evaluation. The medical students and faculty gain experience working within the VA disability compensation system, which hires many of the medical students into positions at the VA medical centers. And the law students gain a better understanding of the medical implications of a legal matter and how to work with a veteran in a more holistic fashion. Additionally, all parties involved gain a more informed perspective of the importance of the work done by each profession when it comes to helping clients and patients in all facets of their difficulties. Ultimately, however, the VA wins in this scenario because the VA receives adequate, effective evaluations done precisely as the VA desires, which can help the rating officials do their jobs more efficiently and avoid unnecessary C&P examinations that are provided at taxpayer expense.

While Stetson and USF provide one model of a medical-legal partnership, it is by no means the only way to get medical professionals trained and involved in the process of helping veterans. Practitioners, be they attorneys or veterans service organizations (non-attorney entities which represent veterans pro bono through the initial claims process),⁹¹ can reach out to retired medical professionals who may be interested in providing their expertise on a pro bono basis and helping our nation's heroes get appropriate evaluations. Additionally, medical professionals who have an interest in helping veterans, like the part-time student at Stetson who helped evaluate Joe's case, can be an invaluable resource, even if it is just to review records and point the veteran and his representative in the right direction.

90. See 38 C.F.R. § 14.269(a) (2016) (explaining the requirements for becoming an accredited veterans service organization). Veterans service organizations are defined by the VA as "non-profit groups [that] advocate on behalf of [v]eterans." U.S. DEP'T OF VETERANS AFFAIRS, NAT'L CTR. FOR VETERANS ANALYSIS & STATISTICS (2016), <http://www.va.gov/vetdata/glossary.asp>. These groups are normally made up of a large number of volunteer veterans and some paid staff. See generally *The Role of National, State, and County Veterans Service Officers in Claims Development: Hearing Before the H. Subcomm. on Disability Assistance and Mem'l Affairs of the Comm. on Veterans' Affairs*, 109th Cong. (2006) (presenting the role that veterans service organizations play, while also recognizing the small number of paid employees qualified to process veterans' claims).

91. See, e.g., CONN. VETERANS LEGAL CTR., <http://ctveteranslegal.org/> (last visited Oct. 11, 2016) (describing the organization's goal to provide veterans with access to free legal assistance covering a wide range of areas).

There are also a number of legal clinics at VA medical centers that can and do forge strong relationships that may allow for the cross-referral of veterans for evaluation and/or legal help in many areas, not limited to disability benefits.⁹² Finally, reaching out to a veteran's private practitioners, visiting with them, and walking them through the steps of filling out a DBQ and the evidentiary standards the VA requires in order to grant benefits is a wonderful use of an advocate or veteran's time and can be very helpful to doctors who want to help the veteran/patient, but do not have the time or resources to research how the VA disability compensation system works.

XI. CONCLUSION

The VA's duty to assist veterans with their disability claims by providing competent and adequate medical examinations is not being met in many instances by the system currently in place. The complexity of the system of disability benefits can confound C&P examiners and private practitioners alike who wish to help a veteran, but do not fully appreciate the nuances of the system and the incredible burden on the rating official attempting to interpret and apply these medical opinions. Having experienced advocates, both lawyers and lay persons, who can help to train medical professionals on the requirements of the VA's disability compensation system and walk the medical professional through the process of evaluation, reporting, and providing an opinion, can make the system work much better for a veteran and the VA.

92. *Id.*

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